

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUANE JOHNSON,

Defendant-Appellant.

UNPUBLISHED
February 11, 2010

No. 289338
Wayne Circuit Court
LC No. 07-004771-01-FC

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

In May 2007, defendant was convicted of armed robbery and sentenced to a prison term of 20 to 35 years. In a prior appeal, this Court affirmed defendant's conviction, but vacated his sentence and remanded for resentencing because "the trial court departed from the guidelines on the basis of offense characteristics that were already taken into account in the scoring of the guidelines." *People v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 2008 (Docket No. 278741), slip op at 4. On remand, defendant was resentenced to another prison term of 20 to 35 years. Defendant again appeals as of right and for the reasons set forth in this opinion, we affirm.

Defendant's conviction arises from his involvement in the robbery of Teron Bush, who was killed during the offense. Bush was targeted because he was a client of defendant's mother, a tax return preparer, and was owed a large tax refund. Defendant led Teron Bush and his two cousins, Dwight and Gerald Bush, to a check-cashing store where Teron could cash his refund check. Brothers Steven and William Johnson were waiting outside the store. When defendant and the Bushes left the store, Steven Johnson shot Teron, who later died. Gerald suffered a nonfatal gunshot wound to his back as he tried to escape. A jury acquitted defendant of charges of first-degree murder and assault with intent to commit murder.

Armed robbery is a class A offense subject to the sentencing guidelines. MCL 777.16y. The guidelines as scored placed defendant in the A-VI cell of the applicable sentencing grid, for which the minimum sentence range is 108 to 180 months (9 to 15 years). MCL 777.62. On remand, the trial court again departed from this range and imposed a 20-year minimum sentence. The court determined that the sentence was justified because of defendant's total offense variable score of 160 points, and because there were multiple victims and the guidelines did not account for what Dwight and Gerald Bush "went through . . . because of this robbery."

A sentencing court must impose a minimum sentence within the sentencing guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). The court may depart from the guidelines range if it “has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a) and (b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). A departure is appropriate “if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines ranges is not proportionate to the seriousness of the defendant’s conduct and to the seriousness of his criminal history,” such that a departure would result in “a more proportionate criminal sentence than is available within the guidelines range.” *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003).

“[T]he Legislature intended ‘substantial and compelling reasons’ to exist only in exceptional cases.” *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). Only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Babcock*, 469 Mich at 257. Objective and verifiable factors are “actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

“On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes.” *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008) (footnotes omitted).

The trial court did not err in finding that there were substantial and compelling reasons to depart from the sentencing guidelines range. Defendant’s total OV score of 160 points exceeded by 60 points the 100 points necessary to place him in the highest category of offense severity. MCL 777.62. An “off-the-chart” score is an indication that the offense variables have been given inadequate weight and provides a valid basis for departure. *People v Sarah Stewart*, 442 Mich 937; 505 NW2d 576 (1993). Further, the court did not abuse its discretion in finding that OV 4 and OV 9 did not adequately account for the harm to Dwight and Gerald Bush. The two variables together accounted for just 20 of the 160 points assessed for the offense variables, which is an indication that they were not given adequate weight. Further, the two variables did not adequately account for the particular trauma suffered by Dwight as he struggled to help two family members, one of whom was dying, or the fact that Gerald was actually shot during the robbery. Nor did the trial court abuse its discretion in finding that a 20-year minimum sentence was more proportionate to the circumstances of the offense than a sentence within the guidelines.

Defendant’s claim that either the scoring of the guidelines or the reasons for the trial court’s departure from the guidelines violated *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), is without merit, as it was in the first appeal defendant brought to this Court. As stated in our prior opinion in this matter, it is well established that *Blakely* does not apply to Michigan’s indeterminate sentencing scheme, even when the court elects to depart

from the guidelines. *People v Uphaus*, 480 Mich 939; 741 NW2d 21 (2007); *People v McCuller*, 479 Mich 672, 676-678; 739 NW2d 563 (2007); *People v Harper*, 479 Mich 599, 603-604; 739 NW2d 523 (2007); *People v Drohan*, 475 Mich 140, 162-164; 715 NW2d 778 (2006).

Affirmed.

/s/ Jane M. Beckering

/s/ Jane E. Markey

/s/ Stephen L. Borrello